

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
ABILENE DIVISION

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ABILENE CHRISTIAN UNIVERSITY	(	No. 1-10-CV-249-C
	(	
vs.	(	
	(	
GERALD EWING	(	

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ANSWER

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TO THE HONORABLE JUDGE OF THE COURT:

GERALD EWING, Defendant, files this Answer, and would show:

1.

Defendant alleges the following to each specific paragraph in the Complaint:

Defendant admits the allegations in Paragraph 1.

Defendant admits the allegations in Paragraph 2.

Defendant denies the allegations in Paragraph 3. The Defendant denies this Court has jurisdiction under the Copyright Act, nor under Federal Question Jurisdiction. Rather, the Court lacks jurisdiction on the ground that the Plaintiff is a Texas Corporation and the Defendant is a Texas resident.

Defendant denies the allegations in Paragraph 4.

Defendant admits the allegations in Paragraph 5.

Defendant admits the allegations in in the first two sentences in Paragraph 6, except denies the last sentence in Paragraph 6.

Defendant denies the allegations in Paragraph 7.

Defendant denies the allegations in Paragraph 8.

Defendant denies the allegations in Paragraph 9.

Defendant denies the allegations in Paragraph 10

Defendant denies the allegations in Paragraph 11.

Defendant denies the allegations in Paragraph 12.

Defendant denies the allegations in Paragraph 13.

Defendant denies the allegations in Paragraph 14.

Defendant denies the allegations in Paragraph 15.

Defendant denies the allegations in Paragraph 16.

Defendant denies the allegations in Paragraph 17.

Defendant denies the allegations in Paragraph 18.

Defendant denies the allegations in Paragraph 19.

Defendant denies the allegations in Paragraph 20.

Defendant denies the allegations in Paragraph 21.

Defendant denies the allegations in Paragraph 22.

Defendant denies the allegations in Paragraph 23.

Defendant denies the allegations in Paragraph 24.

Defendant denies the allegations in Paragraph 25.

Defendant denies the allegations in Paragraph 26.

Defendant denies the allegations in Paragraph 27.

Defendant denies the allegations in Paragraph 28.

Defendant denies the allegations in Paragraph 29.

Defendant denies the allegations in Prayer for Relief.

2.

Except where specifically admitted, the Defendant denies each and every, all or singular, the pleadings in the Complaint and demands strict proof thereof.

3.

The Defendant would specifically show that the Court lacks subject matter jurisdiction, or in the alternative, declaratory judgment jurisdiction. The Defendant will file separately a motion to dismiss for lack of subject matter jurisdiction.

4.

Defendant alleges that the Plaintiff's claims are barred by the doctrine of estoppel;

5.

Defendant alleges that the Plaintiff's claims are barred by the doctrine of waiver;

6.

Defendant alleges that the Plaintiff's claims are barred by the doctrine of unclean hands;

7.

Defendant alleges that the Plaintiff's claims are barred by the doctrine of unfair use.

COUNTERCLAIM

Subject to the Defendant's Answer, or in the alternative, the Defendant alleges this Counterclaim. In addition, this Counterclaim is urged without waiving the Defendant's claim that this Court lacks subject matter jurisdiction.

The Defendant, Gerald Ewing, complains of the Plaintiff, Abilene Christian University, and would allege the following:

1.

Over a course of years, the Defendant, Gerald Ewing, now denominated as Counter Plaintiff, entered into a relationship whereby he would photograph one or more athletic or campus related events at Abilene Christian University in or about Abilene, Texas. Mr. Ewing was, and has been, a skilled photographer, knowledgeable in his trade, and resourceful and productive. The photographs were used by Abilene Christian University for not only campus purposes, but for promotional and commercial purposes. Through a course of trade, Gerald Ewing entered a license with Abilene Christian

University, either oral or implied, for the use, transmission, distribution, transfer and application of the photographs by Gerald Ewing. Abilene Christian violated the license by using, distributing, selling, transmitting or applying the photographs of Gerald Ewing without his permission, express or implied.

For causes of action, the Counter-Plaintiff would allege:

1.

The Counter-Defendant violated or breached the license by using, sell, distributing, or otherwise employing Gerald Ewing's photographs without his permission, express or implied and through its violation or breach proximately caused the Plaintiff to sustain damages for loss of income, loss of compensation, loss of value of the photographs. In reasonably probability, the Counter-Plaintiff will sustain future loss of income, loss of compensation, and loss of value. The Counter-Plaintiff requests recovery of up to \$1.5 million for the past lost damages described above. The Counter-Plaintiff requests recovery of up to \$2.5 million for future damages described above.

2.

In the alternative, the Counter-Defendant was unjustly enriched by using, distributing, displaying and otherwise employing Gerald Ewing's photographs without his permission, express or implied. The Counter-Defendant was unjustly enriched by failing to pay a fair market value for the photographs, and for using the photographs for promotional and commercial advantage. The Counter-Plaintiff seeks recovery of damages under the common law Doctrine of Quantum Meruit. The Counter-Plaintiff has sustained damages for loss of income, loss of value, loss of compensation and loss of a reasonable fee, royalty, or commission. The Counter-Plaintiff requests the recovery of up to \$1.5 million for his damages under the doctrine of quantum meruit.

3.

In the alternative, the Counter-Plaintiff would show that there was an implied contract between him and the Counter-Defendant. The Counter-Defendant breached that implied contract by using



the photographs as alleged above without Gerald Ewing's permission, express or implied. The Counter-Plaintiff requests the recovery of past and future contractual damages.

Prayer

Defendants pray that the Plaintiff take nothing by its suit, and that Defendant have and recover costs of court. Counter-Plaintiff prays that the Counter Defendant appear and answer herein, and after a trial on the merits, the Counter Plaintiff have and recovery compensatory damages as alleged above; reasonable attorney's fees, pre-judgment interest, post-judgment interest, and costs of court.

Respectfully submitted,

Steve Hershberger, Attorney at Law  
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By: /s/ Steve Hershberger  
Steve Hershberger  
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By: /s/ Mary Ann Fergus

Attorney for Defendant

Certificate of Service

I hereby certify that on November 08, 2010, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court, Northern District of Texas, using the electronic case filing system of the Court. The electronic case filing system will send a Notice of Electronic Filing to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

Attorney for Plaintiff:

Robert McRae  
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San Antonio, T0065as 78205.

/s/ Steve Hershberger

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Steve Hershberger